STATE OF MICHIGAN

COURT OF APPEALS

DESMER G. WALCH and APRIL R. KIGGINS,

Plaintiffs-Appellants,

v

WILLIAM P. WALCH, CYNTHIA WALCH, SANDRA KILBOURNE, and NORTHERN LABEL, INC.,

Defendants-Appellees.

UNPUBLISHED
July 26, 2011

No. 296626
Oceana Circuit Court
LC No. 09-007513-CZ

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' second motion for summary disposition, brought in response to plaintiffs' amended complaint. We affirm.

This case arises out of the ownership and control of defendant Northern Label, Inc., a small, label-making company. At the heart of the case are the efforts of defendant William Walch to take control of the company from his father, plaintiff Desmer Walch, and his live-in partner, plaintiff April Kiggins. At the time the problems began, Desmer Walch owned 12,067 shares of the company stock, William Walch owned 5,890 shares, his wife Cynthia owned 172 shares, and Kiggins and defendant Sandra Kilbourne, the company bookkeeper, each owned 2,000 shares. On February 18, 2008, Desmer Walch signed a redemption agreement, under which he redeemed all 12,067 of his shares and Northern Label agreed to pay him $181,000 cash, minus "the receivable" of $171,318.53 (Desmer Walch's alleged debt to the company), for a total of $9,681.47, which was paid by check and cashed by Desmer Walch. He agreed to deliver endorsed certificates for all his shares. The agreement also "terminated and voided" any other agreements between the parties concerning the sale or redemption of shares. Kiggins similarly entered into a redemption agreement. She was to be paid six annual payments of $5,000 each. Both purportedly signed resignations in which they released claims against the company and its officers. However, neither of them delivered endorsed stock certificates.

Just over a year later, Desmer Walch filed suit, raising counts for accounting, fraudulent misrepresentation, breach of fiduciary duty, conversion, unjust enrichment, rescission, and exemplary damages. Regarding the redemption agreement, he alleged that William came to his

house on February 18, 2008, when Desmer Walch was very ill with pneumonia, and told his father that the company was "going broke," that he "needed to redeem his shares and clear his debt," that he would be personally liable for the company's debts if he did not sell his shares, and that he would not incur any tax liability from the sale. Desmer Walch alleged that he cannot read, and he signed what he believed was the redemption agreement only on the condition that William Walch and Kilbourne provide him with the company's financial records. However, he alleges, because defendants have refused to provide that information, he has refused to deliver the stock certificates. He believed the company was not in dire financial straits, and that it actually owed him money, rather than the other way around.

Defendants moved for summary disposition, arguing that Desmer Walch's claims failed because he voluntarily signed the redemption agreement and resignation, and that the statements William Walch allegedly made to induce his father to do so were not actionable in fraud. They attached letters from the company accountant advising William Walch to clear up the debt his father owed the company and to acquire majority ownership. In response, Desmer Walch stated that the signature on the resignation was not his. At the hearing on the motion, defense counsel noted that Desmer Walch had been the majority stockholder and so had the right to access the company's financial information whenever he wanted. Plaintiffs' counsel asserted that even though he was the majority stockholder, Desmer Walch let William Walch run the company. Counsel asserted that Desmer Walch agreed to the redemption contingent on seeing the financial records.

The court granted defendants' motion, stating that the court would have ordered an accounting had one been sought before the documents were signed. The order allowed Desmer Walch to file an amended complaint, which was filed on August 25, 2009. Both Desmer Walch and Kiggins were now named as plaintiffs. The amended complaint included the original counts as well as adding counts for fraud/forgery and civil conspiracy. Plaintiffs included the report of a handwriting expert who opined it was "highly probable" that the signatures on the resignations were not genuine. However, the expert opined, the signatures on the redemption agreements were genuine.

Defendants again moved for summary disposition, arguing that the amended complaint raised no new issues and that adding Kiggins as a plaintiff did not alter this fact because, as his live-in girlfriend, she was in privity with Desmer Walch. Before the motion was heard, defendants moved for a protective order regarding the numerous interrogatories and requests for production plaintiffs served on them, which the court granted. At that hearing, the trial court emphasized that Desmer Walch had stated in his initial complaint that he signed the resignation and waiver, despite later claiming he had not. When defendants' second motion for summary disposition was heard, defendants focused solely on the redemption agreement, which plaintiffs admitted they signed. Defendants again argued that the alleged misrepresentations were not actionable because they were legal conclusions or opinions and that Desmer Walch had the ability to inform himself of the true condition of the company. The trial court agreed, finding the addition of allegations about the signature on the resignation being a forgery insignificant. The plaintiffs had signed the redemption agreements and taken the money, the court found. And representations that the company was going to be in financial trouble were not facts in existence and there was no showing that the statements were not true.

One more hearing was held when plaintiffs objected to the order defendants proposed because it stated, "Defendants as the prevailing parties shall be entitled to tax costs as permitted by court rule." Plaintiffs' position was that the court had not ruled at the motion hearing that defendants could tax costs, and defendants had not made that part of their motion. Defense counsel responded that defendants were entitled to costs under MCR 2.625 unless a statute, court rule, or the court itself prohibited such an award. Defendants also asked for costs associated with having to attend the hearing on plaintiffs' objection. The court recognized that it had not made a ruling regarding costs but that was because they were controlled by court rule, and that, as prevailing parties, defendants were entitled to them. The court found the objection frivolous and awarded defendants their costs for the day's hearing. The court signed the order granting summary disposition as proposed.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Issues of contract interpretation are also reviewed de novo. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

The trial court did not err in granting summary disposition to defendants because plaintiffs' fraudulent misrepresentation claim fails as a matter of law.

> To prove a claim of fraudulent misrepresentation, or common-law fraud, a plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. [*Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008).]

Reliance on the false statement must be reasonable. *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). "There can be no fraud where a person has the means to determine that a representation is not true." *Id*.

Plaintiffs fail to show they reasonably relied on the alleged misrepresentations made by William Walch. Despite Desmer Walch's suspicions regarding his son's finances and defendants' alleged refusal to disclose the company records, plaintiffs agreed to sell their stock without taking the precaution of seeing the records first or requiring disclosure to be part of the written agreement. Even if Desmer Walch was ill and needed help reading, Kiggins averred that she was present at the time the redemption was signed, and there is no evidence that she was hampered in her ability to read the agreement. A party to a contract cannot avoid enforcement by claiming he did not read it, or supposed its terms were different. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 567; 596 NW2d 916 (1999). Further, despite Desmer Walch's affidavit that he asked for the records and was refused, there is no evidence that he was unable to bring a

suit for accounting, which he could have as a fiduciary of the company. Given the clear and unambiguous language of the redemption agreements, they must be enforced as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

Plaintiffs also argue that the trial court erred in issuing the protective order sought by defendants when defendants made no effort to show good cause and reasonable notice. A trial court's decision whether to grant a protective order limiting discovery is reviewed for an abuse of discretion. MCR 2.302(C)(1); *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 142; 715 NW2d 398 (2006). An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008).

Under MCR 2.302(C)(1), a protective order may be granted on a showing of good cause and reasonable notice. A protective order is issued to protect a party "from annoyance, embarrassment, oppression, or undue burden or expense."

We conclude that the trial court did not abuse its discretion in granting defendants' motion for a protective order. The trial court recognized the amended complaint was nearly identical to the original complaint and that the discovery plaintiffs sought would have given them the remedy of an accounting without having to prove their case. Had the court ultimately decided to deny defendants' second summary disposition motion, plaintiffs could have moved to vacate the protective order and proceeded with discovery. Plaintiffs' requests were not worded in a way that would have elicited information regarding their own willingness to sign the redemption agreements. In fact, because they were the ones alleging fraud, the burden was on them to prove they could not have informed themselves of the company's true financial status before signing the agreements. Preventing plaintiffs from proceeding with discovery precluded the undue burden that would result if the court later granted defendants' summary disposition motion, as was likely. Thus, we hold that the trial court's order did not exceed the range of principled and reasonable outcomes.

Finally, plaintiffs argue that the trial court erred in awarding defendants their costs for the hearing on plaintiffs' objection to the proposed order. MCR 2.625(A)(1) provides, "Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." As the trial court noted, it was not required to find defendants were entitled to costs; under MCR 2.625, they were entitled unless the court found to the contrary. *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997). Thus, it was not erroneous to include the statement in the order where there was no dispute that defendants were the prevailing parties and where any argument over the reasonableness of costs was premature. The trial court cannot be said to have abused its discretion in awarding costs where there was nothing legally incorrect about the order defendants proposed. See *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996).

Affirmed.

/s/ Peter D. O'Connell
/s/ Donald S. Owens